UCL

Centre for Law, Economics and Society

Research Paper Series: 5/2014

Image © European Union, 2015

In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods

Ioannis Lianos

Centre for Law, Economics and Society
CLES
Faculty of Laws, UCL

Director: Professor Ioannis Lianos

CLES Research Paper Series
5/2014

In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods

Ioannis Lianos

June 2014

Centre for Law, Economics and Society (CLES)
Faculty of Laws, UCL
London, WC1H 0EG
The CLES Research Paper Series can be found at
www.ucl.ac.uk/cles/research-paper-series

All rights reserved.

No part of this paper may be reproduced in any form without permission of the authors.

Pre-published version of Ioannis Lianos, In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods, European Law Review (forthcoming 2015)

ISBN *978-1-910801-03-1*

© Ioannis Lianos 2014

Centre for Law, Economics and Society

Faculty of Laws, UCL

London, WC1H 0EG

United Kingdom

In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods

Ioannis Lianos

Abstract

The Keck jurisprudence of the CJEU constituted an important milestone in the effort to develop workable principles for the interpretation of Article 34 TFEU in a way that would not jeopardize the ability of Member States to regulate their economy and pursue other public policy objectives than promoting trade. Yet it seems that the Keck era has come to an end. In its most recent case law on the free movement of goods the Court returned to an overbroad definition of MEQR and restricted the legal categorization approach previously employed in favour of one relying on the balancing of conflicting interests and values. The study explores the rise and progressive demise of the legal categorization approach before focusing on the return to a broad definition of MEQR with a re-interpretation of the market access rule. The broader implications of this approach are then examined, in particular the reformation of the free movement of goods EU law in the era of the EU/Canada Comprehensive Trade and Economic Agreement (CETA) and the ongoing negotiations on the Transatlantic Trade and Investment Partnership (TTIP).

Keywords: free movement of goods, regulatory policy space, CETA, TTIP, EU Internal Market, trade, measures equivalent to a quantitative restriction

JEL Classification: F15, K33

In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods

Ioannis Lianos*

1. Introduction

The judgment of the CJEU in *Keck and Mithouard* and its implications have been a recurrent theme in recent scholarship in the area of the free movement of goods[1]. The judgment has led to an intense debate as to the development of different "tests" or judicial techniques for the enforcement of Article 34 TFEU and the definition of what constitutes a measure having equivalent effect to a quantitative restriction. The most emblematical judgments for the interpretation of this provision remain *Dassonville* and *Cassis de Dijon*, which established the sequence of analysis applied by the Court ever since, across all four freedoms: (i) a far-reaching definition of the notion of obstacle to trade, combined with (ii) the possibility to justify the said obstacle by means of mandatory (or imperative) requirements in the general interest applied in a

* Professor, Faculty of Laws, University College London and Director, Centre for Law, Economics and Society, UCL Faculty of Laws. Part I.A. of the paper expands the argument made in previously published works, in particular, I. Lianos, "Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of Economic Integration", (2010) 21(5) E.B.L.Rev705 on "efficient trade" and I. Lianos & J. Leblanc, "Trust, Distrust and Economic Integration : Sketching the theory" in I. Lianos & O. Odudu (eds.), *Regulating Trade in Services in the EU and WTO: Trust, Distrust and Economic Integration* (Cambridge: CUP, 2012), pp. 17-56 on the "trust theory" of economic integration. Many thanks to Oke Odudu and to the editors of the European Law Review for their comments. The usual disclaimer applies.

[1] See, among others, L. Azoulai (eds), *L'entrave dans le droit du marché interieur* (Brussels: Bruylant, 2011); C. Barnard, "Restricting Restrictions: Lessons for the EU from the US?", (2009) 68(3) Cambridge L J. 575; G. Davies, "Understanding market access: exploring the economic rationality of different conceptions of free movement law" (2010) 11 German Law Journal 671; D. Doukas, "Untying the Market Access Knot : Advertising Restrictions and the Free Movement of Goods and Services", (2006-2007) 9 C.Y.E.L.S. 177; P. Eeckhout, "Recent Case Law on Free Movement of Goods: Refining Keck and Mithouard", (1998) E.B.L.Rev. 267; A. Fromont & C. Verdure, "La consécration du critère de l'"accès au marché" en matière de libre circulation des marchandises : mythe ou réalité?", (2011) 47 (4) Revue Trimestrielle de Droit Européen, 717; T. Horsley, "Unearthing Buried Treasure: Article 34 TFEU and the Exclusionary Rules" (2012) 37 (6) E.L.Rev., 734; R. Kovar, "Dassonville, Keck et les autres : de la mesure avant toute chose'", (2006) 42(2) Revue Trimestrielle de Droit Européen (RTDE) 213 ; P. Koutrakos, "On Groceries, Alcohol and Olive Oil : More on the Free Movement of Goods after *Keck",* (2001) 26 E.L.Rev. 391 ; P. Oliver, "Of trailers and jet skis : is the case law on Article 34 TFEU hurtling in a new direction?*"*, (2010) 33(5) Fordham International Law Journal, 1423; N.N. Shuibhne, "The free movement of goods and Article 28 EC : an evolving framework", (2002) 27 (4) E.L.Rev., 408; N.N. Shuibhne, *The Coherence of EU Free Movement Law – Constitutional Responsibility and the Court of Justice* (Oxford: OUP, 2013), pp. 234-256; J. Snell, "The Notion of Market Access: A Concept or a Slogan?", (2010) 47 C.M.L.Rev. 437; P. Wennerås & K. Bøe Moen, "Selling arrangements, keeping Keck" (2010) 35 (3) E.L.Rev., 387.

proportionate manner, i.e., appropriate, necessary and reflecting the (lack of) equivalence of the regulatory framework in place in the country of origin[2].

The first legal technique to which the Court of Justice of the European Union (hereinafter CJEU) turned to in order to accommodate the need to promote trade and the pressure of Member States for increased regulatory policy space was the balancing of the conflicting interests/values, performed through the means of the proportionality test. Yet, the CJEU had, in parallel, recourse to a technique of avoidance of a full balancing of the various interests affected, with the development of a presumption that if a specific public interest is taken into account by the legislation of the State of the origin of the product (Home State), the State of import (Host State) would have the burden to prove that the regulatory framework in the Home State was not functionally equivalent (principle of functional parallelism/equivalence)[3]. The joint operation of the presumption of functional parallelism/principle of equivalence and the broad interpretation of the notion of obstacle to trade led to an overbroad implementation of Article 34 TFEU against any national measure affecting intra-EU trade, as this was exemplified by the Sunday Trading case law of the CJEU[4].

With an implementation of Article 34 TFEU getting out of control and the wide scope of the balancing approach leading to political backlash with the Member States, eager to protect their regulatory policy space, the Court has given consideration to different techniques in order to limit the scope of the balancing approach. The Court envisaged establishing some quantitative (*de minimis*) threshold for significant impediments to cross-border trade, although it decided eventually not to follow that route[5]. It later developed a qualitative

[2] *Procureur du Roi v Benoît and Gustave Dassonville* (8/74) [1974] E.C.R. 837, para. 5 and *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) (120/78) [1979] E.C.R. 649, paras. 8-11 and 14-15.

[3] On the different interpretations of this principle, see J. H.H. Weiler, "Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods", in P. Craig & G. de Búrca (eds) *The Evolution of EU Law* (Oxford: OUP, 1999), p. 349; N. Bernard, "Flexibility in the European Single Market" in C. Barnard and J. Scott (eds), *The Law of the Single European Market - Unpacking the Premises* (Oxford: Hart Publishing, 2002) pp. 101-122, pp.104-105.

[4] For an analysis see, C. Barnard, "Sunday Trading: a Drama in Five Acts", (1994) 57 M.L.R., 449.

[5] Advocate General (AG) Jacobs, *Leclerc-Siplec v. TF1 Publicité SA (*C-412/93) [1995] E.C.R. I-179. For academic support, see S. Weatherill, "After Keck: Some thoughts on how to clarify the clarification", (1996) 33 C.M.L.Rev. 885. See also, more recently, M.S. Jannson & H. Kalimo, "De minimis meets "market access": Transformation in the substance – and the syntax- of EU free movement law?" 51(2) C.M.L.Rev. 523. The Court nevertheless decided to abandon that route in *Criminal proceedings against Jan van den Haar and Kaveka de Meern BV (*Joined Cases 177 & 178/82) [1984] E.C.R. 1797, although the terminology "insignificant effects" appears in some cases [see, *Burmanjer & Others*(C-2-/03) [2005] E.C.R. I-4133, para 31] and to a certain extent one may claim that the emphasis put by the recent case law of the CJEU on the "considerable" influence exercised by the national measure on the behaviour of consumers may amount to some form of d*e minimis* criterion: see, *Commission v. Italian Republic* (C-110/05) [2009] E.C.R. I-519, para. 56.

threshold relying on causation principles in order to exclude restrictions of trade that are "too uncertain and indirect"[6].

The *Keck and Mithouard* case law of the CJEU is an important milestone in this effort to develop workable principles for the interpretation of Article 34 TFEU in a way that would not jeopardize the ability of Member States to regulate their economy and pursue other public policy objectives than promoting trade. The case is significant, first for the limitation it introduced in the scope of the balancing approach by using an alternative legal technique, that of legal "categorization"[7]. "Categorization" constitutes an alternative to balancing to the extent that the disputes focus on classification of facts within existing legal categories and the definition or redefinition of the boundaries of existing legal categories or the creation of new ones[8]. By developing specific categories attached to evidential (factual) and substantive legal presumptions, the CJEU attempted to limit the instances in which it would be required to balance the value of trade with the various other public policy interests pursued by the Member States. This was not the first time the Court was resorting to legal categorization. The Court had long accepted the distinction between discriminatory and indistinctly applicable measures, initially proposed

[6] See, *Krantz* (C-69/88) [1990] E.C.R. I-583, para 11; *Peralta* (C-379/92) [1994] E.C.R. I-3453, para. 24; *Bluhme* (C-67/97) [1998] E.C.R. I-8033, para. 22. On "remoteness" and its links with *Keck*, see P. Oliver, "Some further reflections on the scope of Article 28-30 (ex 30-36) EC", (1999) 36 C.M.L.Rev. 783, pp. 788-789; E. Spaventa, "The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of Keck, Remoteness and Deliège", in C. Barnard & O. Odudu (Oxford: Hart Publishing, 2009), pp. 245-271; N.N. Shuibhne, *The Coherence of EU Free Movement Law – Constitutional Responsibility and the Court of Justice* (Oxford: OUP, 2013), pp. 157-188.

[7] On the distinction between "categorization" and "balancing" as techniques for limiting "judicial legislation" and, in our case, also the extension of the scope of negative integration, see, K. M. Sullivan, "Post-liberal Judging: The Role of Categorization and Balancing", (1992) 63 University of Colorado Law Review 293.

[8] As Sullivan (*supra*) explains:

> "Categorization and balancing each employ quite different rhetoric. Categorization is the taxonomist's style-a job of classification and labeling. When categorical formulas operate, all the important work in litigation is done at the outset. Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government's justification for the infringement. Balancing is more like grocer's work (or Justice's)-the judge's job is to place competing rights and interests on a scale and weigh them against each other.
>
> Here the outcome is not determined at the outset, but depends on the relative strength of a multitude of factors".

On the distinction between proportionality, as a form of balancing, and categorization see, A. Barak, *Proportionality – Constitutional Rights and their Limitations* (Cambridge: CUP, 2012), 508-509 ("Methodologically speaking, thinking in legal categories stands in sharp contrast to legal thinking based upon specific, or *ad hoc*, balancing […] The focus on categories was meant, among others, to prevent the use of specific balancing in each case. The characterization of a set of facts as being attributed to a certain category led to a legal solution, without the need to conduct a specific balancing within that category […] once the contours of the category […] are determined, there is no room for additional balancing". The author argues that the main difference between proportionality and legal categorization is the focus of the first on the conduct of a specific, *ad hoc*, balancing).

by the European Commission in 1970[9], before adding in *Keck* the dichotomy between measures relating to product requirements and selling arrangements[10].

The second important contribution of *Keck* was more implicit and had to do with the related question of defining what constitutes an obstacle to trade that may fall under the scope of the prohibition principle of Article 34 TFEU. In *Keck* the CJEU seemed to have abandoned the overbroad definition of Measures Equivalent to a Quantitative Restriction (hereinafter MEQR) as obstacles to trade for an approach focusing on the disparate impact of national measures on the market access of foreign products in comparison to domestic goods. The Court required plaintiffs to provide evidence that the rules on selling arrangements in question have a discriminatory impact (in law or in fact) on the market access of the imported goods[11]. The Court made use of the terminology of "market access" in its post-Keck case law, although the interpretation and practical utility of this concept has been a matter of controversy, as the Court has never taken steps to define it clearly[12].

The *Keck* "revolution" has had its fair share of critics and admirers. It led to an intense effort of the CJEU to make sense of the new legal categories that emerged and to define their boundaries[13]. It also generated some soul searching by the CJEU and various EU institutions on the objectives of market integration and the broader architecture of the Internal Market project. Yet it seems that the *Keck* era has come to an end. In its most recent case law on free movement of goods the Court returned to an overbroad definition of MEQR, using the notion of "market access", and restricted the legal categorization approach in favour of one that would rely on the balancing of conflicting interests and values.

In the first part I will explore the rise and progressive demise of the legal categorization approach leading to the dislocation of the first contribution of

---

[9] Directive 70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty [1970] OJ L 13/29.

[10] *Criminal proceedings against Bernard Keck and Daniel Mithouard* (hereinafter *Keck*) (Joined Cases C-267/91 and C-268/91), [1993] E.C.R. I-6097, para. 16.

[11] The Court also explained that the prohibition of "discrimination in fact" precluded any measure that would be "by nature such as to prevent [the imported goods'] access to the market or to impede access any more than it impedes the access of domestic products: *Criminal proceedings against Bernard Keck and Daniel Mithouard* (hereinafter *Keck*) (Joined Cases C-267/91 and C-268/91), [1993] E.C.R. I-6097, para. 17.

[12] For a discussion, J. Snell, "The Notion of Market Access: A Concept or a Slogan?", (2010) 47 C.M.L.Rev. 437; I. Lianos, "Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of ''Economic" Integration", (2010) 21(5) E.B.L.Rev.705.

[13] See, for instance, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* (C-470/93) [1995] E.C.R. I-1923 (on the distinction between pure selling arrangements and marketing methods employed by the trader that affect the nature, composition or packaging of the good, which are treated as product requirement rules) or the more recent case law of the CJEU implicitly distinguishing restrictions on the use of products from the *Keck* categories (see, for instance, *Mickelsson and Ross*, (C-142-05) [2009] E.C.R. I-4273), although one may also advance the view, as I will do in the remainder of this study, that the Court seems to have used this case law in order to revisit the scope of Article 34 TFEU and to implicitly abandon the legal categorization approach inaugurated in *Keck*.

the *Keck* case law, before focusing, in the second part, on the return to a broad definition of what may constitute an obstacle to trade, under Article 34 TFEU, with a re-interpretation of the market access rule, and the broader implications of this approach, thus leading to the implicit abandonment of the more restrictive "disparate market access" approach inaugurated in *Keck*. Some final thoughts on the possible linkage of the reformation of the free movement of goods EU law with the external dimension of EU Trade Policy, in particular the EU/Canada Comprehensive Trade and Economic Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP) negotiations will follow.

2. The rise and fall of the legal categorization approach

2.1. The development of legal categories in the implementation of Article 34 TFEU

From the very beginning, the discussion over the implementation of Article 34 TFEU has focused on the development of workable legal categories that could guide the courts in their interpretation of this Treaty provision[14]. The nature of these legal categories has been a matter for theoretical speculation. One may advance the view that they constitute presumptions that a measure constitutes, or not, an obstacle to trade or a measure equivalent to a quantitative restriction (MEQR). Yet, presumptions can be legal (an analytical shortcut) or evidential/factual (an evidence-suppressing rule). They can also be either rebuttable or irrebuttable. Taking, for instance, the category of discriminatory measures, it is undeniable that its function consists in leading to the finding that the measure falls within the scope of the prohibition principle in Article 34 TFEU (a legal presumption). The possibility of justification or exception from the prohibition is provided by Article 36 TFEU, under restrictive conditions[15]. Yet, this does not rebut the presumption that a discriminatory measure constitutes a MEQR, this being the consequence of the analytical shortcut according to which discriminatory measures constitute a MEQR and are prohibited by Article 34 TFEU.

In comparison, the presumption that a measure concerning selling arrangements does not lead to obstacles to trade, set by the CJEU in *Keck and Mithouard*, constitutes an evidence-supressing rule: The category or the nature of the measure makes superfluous any finding that it does not produce any obstacles to trade. This presumption may be rebutted if the claimant

[14] The first very effort was the distinction established in Directive 70/50/EEC between discriminatory measures (measures which clearly accorded different treatment to domestic and imported goods) and indistinctly applicable measures: Directive 70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty [1070] OJ L 13/29.

[15] See however *Commission v. Finland* (C-54/05) [2007] E.C.R. I-2473 (examining how the mandatory requirement of road safety might justify a distinctly applicable/discriminatory measure)

provides evidence that the selling arrangement constitutes, in reality, a disguised product requirement, or has the same effect as a product requirement. Such presumption may also be rebutted if the measure in question is "by nature such as to prevent [the imported goods'] access to the market or to impede access any more than it impedes the access of domestic products[16].

An inversely directed factual presumption operates for the measures characterized within the "product requirements" legal category. These are found *prima facie* to constitute obstacles to trade, which may fall within the scope of the prohibition principle contained in Article 34 TFEU if qualified as MEQRs. This is not a legal presumption, as it is for discriminatory measures, in the sense that it does not lead to the finding that the measure in question infringes Article 34 TFEU. It is still possible for Member States to rebut that presumption over the existence of obstacles to trade, by arguing mandatory requirements of general interest[17]. One should understand the different operation of the mandatory requirement test, in comparison to the possibility offered in the context of Article 36 TFEU to justify discriminatory measures or other measures *already* qualified as a MEQR, the former being a way to rebut a factual presumption that a measure constitutes an obstacle to trade and thus a MEQR, while the latter an exception to the prohibition principle contained in Article 34 TFEU.

An additional presumption contained in the case law of the CJEU on MEQR is that of functional parallelism/equivalence[18]. This operates as a factual presumption in the context of the second step of the analysis, as it leads to the finding that the level of protection of the public interest objective in the Home Member State is similar/equivalent to that in the Host Member State arguing for a mandatory requirement justifying the *prima facie* finding of an obstacle to trade. This precludes the Host Member State from the possibility to advance justifications for the restriction of trade. Theoretically, this presumption may be rebutted if the Host Member State manages to prove that the level of protection of the specific public interest is not equivalent to that of the Home State, although, in practice, it has proven particularly difficult to carry this burden of proof.

The legal categories and associated factual presumptions resulting from the *Keck* jurisprudence were intended to provide a safe harbour for national measures characterized as selling arrangements. These were preserved from the intensive balancing approach performed to product requirements. Yet, the legal category of selling arrangements has started to erode almost immediately after its inception, with a number of cases of the CJEU recognizing the complexity of the characterization of the facts as entering in the selling arrangement or the product requirement legal category, and the

[16] *Criminal proceedings against Bernard Keck and Daniel Mithouard* (hereinafter *Keck*) (Joined Cases C-267/91 and C-268/91) [1993] E.C.R. I-6097, para. 17.
[17] *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein* (hereinfter *Cassis de Dijon*) (120/78) [1979] E.C.R. 649.
[18] *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (120/78), [1979] E.C.R. 649.

attraction exercised by the "market access" concept/narrative introduced in *Keck*, as an alternative means to limiting the scope of the balancing test in the context of Article 34 TFEU.

2.2. The (vain) search for new legal categories…and the emergence of the "market access" concept

Although the *Keck and Mithouard* dichotomy of product requirements and selling arrangements has been referred to in the case law of the Court post Keck[19], it has been criticized for establishing haphazard factual presumptions and the most recent case law of the Court seems to avoid any reference to it[20].

First, the CJEU referred to additional legal categories, importing Article 34 TFEU some terminology employed for the interpretation of the competition law provisions of the Treaty. Some recent cases of the Court have introduced the distinction between measures that have as their purpose/object to treat less favourably products from other Member States and those that do this by their effect[21]. The distinction between object and effect seems to refer to a factual presumption that certain types of measures treat less favourably foreign products by their nature, while others may arrive to the same result by their effect. The first category (object/purpose) may seem redundant in view of the legal presumption that overt discriminations constitute MEQR, unless the type of measures covered by the former category is wider than that of those covered by the second. It has always been accepted that the category of discriminatory measures or distinctly applicable measures does not cover measures that are not discriminatory by reason of the nationality of the producer or the national origin of the good (measures that formally apply equally to both domestic and imported goods). Yet, one may imagine that measures that by their object treat less favourably foreign products may refer to a larger set of prohibited conditions (than nationality of the producer or national origin of the good), although it is not clear what these would be in the context of the free movement of goods[22]. Hence, the conceptual category of measures that by their object/purpose/nature treat less favourable foreign products seems redundant and collapses to that of discriminatory measures.

Measures whose effect is to treat less favourable foreign manufacturers and products constitute formally indistinctly applicable measures, although

[19] For analysis, see C. Barnard, *The Substantive Law of the EU* 4th ed. (Oxford: OUP, 2013), Chapter 5.

[20] The CJEU did not cite the *Keck and Mithouard* precedent and the selling arrangement/product requirement dichotomy in *Mickelsson and Ross* (C-142-05) [2009] ECR I-4273; See also, more recently, *Commission v Poland* (C-639/11), March 20, 2014; *Commission v. Lithuania* (C-61/12) March 20, 2014; *Commission v. Spain* (C-428/12) April 3, 2014. The last time the *Keck and Mithouard* was cited by the CJEU as good law dates from 2010: *Ker-Optika bt v. ÀNTSZ Dél-dunántúli Regionális Intézete*, (C-108/09) [2010] E.C.R. I-12213, para. 51.

[21] In particular, see *Commission v. Italian Republic*, (C-110/05) [2009] E.C.R. I-519, para. 37.

[22] Residence might be such a criterion in the context of the free movement of services or the right of establishment.

their effect in practice leads to indirect discrimination. As such, they are not part of the legal presumption relating to discriminatory measures. Yet, it is difficult to evaluate the interaction with the factual presumption applying to measures that treat by object less favourably foreign products. The reason the Court referred to this category may be simply to highlight that discrimination is not the decision-criterion for the application of Article 34 TFEU, the Court noting in a recent judgment that

> "[…] it is clear from the case law that a measure, even if it does not have the purpose or effect of treating less favourably products from other Member States, is included in the concept of a measure equivalent to a quantitative restriction within the meaning of Article 34 TFEU if it hinders access to the market of a Member State of goods originating in other Member States"[23].

Hence, the category of "measures whose effect is to treat less favourably foreign manufacturers and products" appears to operate as a factual presumption that the measure in question hinders market access, the later concept becoming the key decision criterion for the application of Article 34 TFEU.

This brings me to the second important development post-*Keck*: the emergence of the "market access" concept. This raises questions as to the exact content of this term and its relation with the existing presumptions and other categories advanced by the jurisprudence of the Court. As I have shown elsewhere[24], there are two possible interpretations of the "market access" concept. One may consider that any additional regulatory burdens imposed by the country where the goods are imported/or sold (for convenience purposes I will refer to the country of destination as "host country") on foreign goods (for convenience purposes I will refer to the country of origin of the good as the "home country") constitute obstacles to trade and impede the market access of foreign manufacturers (and their goods) to the home state's market ("the obstacles to trade" approach). One could also take a narrower perspective and focus on the differential effect of the measure on the market access of foreign products compared to national ("host state") products. Hence, the market access of foreign products would not be affected by a measure that does not modify such competitive relationship. I will refer to this approach as the "disparate impact on market access" or "discriminatory market access" approach, in order to emphasize that the important element here is the disparate/differential impact of the national measure on the opportunities of the foreign good to gain access to the host state's market. I have demonstrated elsewhere that the development of evidential/factual presumptions by the CJEU in *Keck* for selling arrangements and product requirements was justified by the recourse to a disparate market access

[23] *Commission v. Spain* (new transport trucks) (C-428/12), April 3, 2014, not yet published, para. 29.

[24] I. Lianos, "Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of ''Economic" Integration", (2010) 21(5) E.B.L.Rev.705.

approach that was the only one explaining the choice of the dichotomy between selling arrangements and product requirements.

If one considers that the aim of the prohibition of MEQR is to increase levels of trade between Member States (the so called "obstacles to trade" approach), the provision will strike down any state regulation that would have a negative effect on a credible opportunity of trade. For a credible opportunity of trade to arise, consumers should be able to gain access to the good in question (demand side) and importers/traders should have the incentive to bring it on the market (supply side). This depends on the profitability of the import, which is a function of the competitive position of the product, in relation to other products already present in the national market, and of the eventual costs that might affect the foreign product's competitive position. It is clear that a product which is subject to two different state regulations, those of its home jurisdiction and the country of import, may incur higher costs than a product which is subject only to its home state regulation. From this perspective, any measure imposed by the host state would be deemed to affect the market access of the foreign good. This cannot be the correct interpretation of the "market access" concept, as it transforms Article 34 TFEU to a deregulatory tool. This was never the purpose of this provision, in view of the overall context and the letter of the constitutive treaties and the fact that most, if not all, European jurisdictions, constitute mixed economies with intense state regulation for the purposes of public interest[25].

The choice of the appropriate approach depends, of course, on the aim of economic integration. If the overall objective is to enhance the economic freedom of suppliers or to facilitate intra-community trade as a matter of principle, any state regulation that may reduce the potential of inter-state commerce would fall under the scope of the prohibition of MEQR. It follows that a regulation that imposes additional costs for the specific product to reach the consumers of the host country might limit the opportunities of intra-community trade, as higher costs would lead to higher prices and lower levels of output. If, however, the overall aim of the specific economic integration is to

[25] In order to make the point, I compared in a previous article the broad "obstacle to trade" approach to the Bainian definition of barriers to entry and the narrower "discriminatory market access" approach to the Stiglerian definition of barriers to entry: see, I. Lianos, "Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of ''Economic" Integration", (2010) 21(5) E.B.L.Rev.705. The primary conceptual difference between Stigler's and Bain's definition is that, for Bain, the entrant and incumbent are compared post-entry: a barrier exists if the two are not equally efficient after the costs of entering the industry are taken into account. In contrast, Stigler considers an entry barrier to exist only if the conditions of entry were less difficult for established firms than for new entrants (so that involves a comparison of the burdens imposed pre-entry). The important element of the second, narrower, view is the use of a comparative burdens methodology and its focus on the competitive relationship between the imported and the domestic product, which should not be altered by the national measure. However, the states should be free to adopt regulation that will not alter the competitive relationship between the two products, even if this may lead to a reduction of the overall volume of trade. I will discuss briefly in the following section how courts could determine this alteration of the competitive relationship between imported and domestic goods.

enhance "efficient trade"[26], then only restrictions of inter-state trade that modify the competitive relationship between the imported goods and the domestic goods, in favour of the second, should be included in the first step of the analysis under Article 34 TFEU.

The Court referred to the "market access" concept in a number of cases, although it has not been clear as to which of the two interpretations of the market access concept it referred to. The assumption is that conditions of access to the consumer market are less difficult for domestic products than for imported products (which means that domestic incumbents have an advantage over foreign entrants). Imported products are less likely to be known to consumers than domestic products and similarly less likely to make extensive use of advertising to the consumers of the host country in order to compete in equal terms with domestic products. Restrictions on specific forms of advertising may, for instance, have the effect to impose on the foreign product costs that would not be incurred by the domestic products. The importers would need to have recourse to less appropriate forms of advertising or, in case there is a total ban on advertising, to more costly methods for the promotion and successful commercialisation of their products. This is not, however, a sufficient factor for the application of Article 34 TFEU[27]. The measure should have the effect to modify the competitive relation between the foreign and the domestic products[28].

The concept of market access has also been referred to in some recent case law of the CJEU examining measures restricting the use of products. In *Commission v. Italy* (prohibition on mopeds) the Court examined the provision of the Italian Highway code prohibiting the use of a motorcycle and a trailer together, noting that settled case law on Article 34 TFEU

> "reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactures and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets"[29].

The Court referred to both the *Cassis de Dijon* and the *Keck* jurisprudence, signalling that both are good law. It also referred to the principles of non-discrimination, mutual recognition and market access, without, however, explaining the link between the three concepts. More importantly, the CJEU explored in this case two techniques/tests for the application of Article 34 TFEU, the second one being quite innovative. The

---

[26] I. Lianos, "Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of ''Economic" Integration", (2010) 21(5) E.B.L.Rev.705.

[27] See *A-Punkt Schmuckhandlers GmbH v. Claudia Schmidt* (C-441/04) [2006] E.C.R. I-2093, para 23, where the Court acknowledged that "the fact that a marketing method is apparently more efficient and profitable is not a sufficient reason to assert that the national provision prohibiting it is caught by the prohibition laid down in Article 34 TFEU. This constitutes a measure having equivalent effect only if the exclusion of the relevant marketing method affects products from other Member States more than it affects domestic products".

[28] See, AG Geelhoed in *Douwe Egberts* (C-239/02) [2004] E.C.R. I-7007 (suggesting that a general prohibition of advertising of the distinctive characteristics of a product should be falling per se under Article 34 TFEU as it discriminates against imports).

[29] *Commission v. Italian Republic* (C-110/05) [2009] E.C.R. I-519, para 18.

Court distinguished between the situation of trailers that were not specifically designed for motorcycles, but intended to be towed by automobiles and other types of vehicle, and that of trailers specifically designed to be towed by motorcycles. The Court found that the Commission had not established that the prohibition hindered access to the market for the first type of trailer applying here the qualitative causation test it had used in the past to exclude from the scope of Article 34 TFEU measures that were "too uncertain and indirect" or "too random and indirect" [30]. The situation was different for the trailers that were specially designed to be towed by motorcycles, as the possibilities for their use, other than with motorcycles, was found "very limited", "inappropriate", "insignificant, if not hypothetical"[31]. The Court did not, however, limit itself to presume the obstacle to trade from the restriction on the use of the product. It further explained that

> "(i)t should be noted in that regard that a prohibition on the use of a product in the territory of a Member State has a considerable influence on the *behaviour of consumers*, which, in its turn, affects the access of that product to the market of that Member State"[32].

Indeed, "consumers, knowing that they are not permitted to use their motorcycle with a trailer specially designed for it, have practically no interest in buying such a trailer"[33]. The prohibition in question had the effect to prevent demand "from existing in the market for such trailers and therefore hinders their importation"[34].

The reference by the Court to the effect of the restriction on the behaviour of consumers emphasizes the fact that between the two situations trailers are used, the difference is of qualitative, not of quantitative nature. The Court did not focus on the effect of the restriction on the volume of imports of the product, as the volume affected might be more important in the case of trailers not designed to be towed by motorcycles, in case these attract the largest part of the consumer demand for trailers, but on the ability of the measure to influence the behaviour of consumers and restrict consumers' choice. This has important implications as it includes, as I have noted in a previous publication[35], for the first time, in defining the existence of a MEQR a direct reference to the effects of the measure on the demand side, the consumers, and not only on the supply side, the importers/foreign suppliers. The aim of market integration is to ensure access of the product to the consumers. Any measure that might jeopardize this access would fall under the scope of Article 34 TFEU. As the CJEU noted in *Percy Mickelsson* this could happen if, because of the "scope" of the restriction on the use of the product, consumers, "knowing that the use permitted by such regulations is

[30] Ibid., para 51
[31] Ibid., para 55
[32] Ibid., para 56.
[33] Ibid., para 57.
[34] Ibid.
[35] I. Lianos, "Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of ''Economic" Integration", (2010) 21(5) E.B.L.Rev.705.

very limited", will "have only a *limited* interest in buying that product"[36]. AG Poiares Maduro also explained in *Alfa Vita* that "the fundamental objective of the principle of free movement of goods is to ensure that producers are put in a position to benefit, in fact, from the right to carry out their activity at a cross-border level, while consumers are put in a position to access, in practice, products from other member States *in the same conditions* as domestic products"[37].

What remained unclear in this case law was how this emphasis on the behaviour of consumers related to the concept of the "disparate impact on market access", or more broadly the market access rule which constitutes, as explained below, the cornerstone of the application of Article 34 TFEU. This emphasis on the demand side highlights a consideration of the competitive situation to which the imported product is subject to (in view of the behaviour of consumers) and, from this perspective, it presents some commonalities with the narrower view of market access, which also requires the consideration of the competitive relation between the domestic and foreign/imported products.

First, the imported product might be in competition with a similar or competing domestic production. A MEQR would exist each time the host State regulates in a way that imposes to this economic operator (additional) costs that are not incurred by competing domestic production. Reference to additional costs raises of course the question of which comparator is adopted in order to consider that these costs are additional. Although the case law of the Court is not very clear on that, it seems that, for the application of Article 34 TFEU, at least since *Keck*, there is an implicit comparison made to the costs incurred by the domestic product, and not a comparison made to the cost structure of the foreign product when this is commercialized in the home state. This does not mean that the plaintiff should proceed to a concrete comparative analysis of the impact of the regulation on the costs of specific imported and domestic products. That would of course increase litigation costs and would not fit the purpose of the analysis, which is not to subject state regulation to an intense scrutiny of its economic rationality but to assess if the measures imposed by the Member state had a protectionist purpose or effect. It is possible to perform a more abstract assessment of the costs imposed on the domestic production, based on some widely known notorious facts or beliefs. For example, there is no need to examine whether a restriction on advertising would affect more imported products than specific competing domestic products. It is assumed that "domestic production" is generally better known to local consumers than the imported products. Of course, this is not always true, as some domestic products might be less known to consumers than imported products (in particular if they benefit from

[36] *Percy Mickelsson and Joakim Roos* (C-142/05) [2009] E.C.R. I-4273, para 27. Note the difference of language with *Commission v. Italian Republic* (C-110/05) [2009] E.C.R. I-519, limited interest versus practically no interest.

[37] AG. Poiares Maduro, *Alfa Vita Vassilopolos AE v. Elliniko Dimosio* (Joined Cases C-158/04 and C-159/04) [2006] E.C.R. I-8135, para. 39.

the brand effects of global branding), but, in general, it is reasonable, in view of the policy objective to integrate markets, to make this assumption for the general category of “domestic products”.

Second, the imported product might not be in competition with any similar or domestic production. Its access to the market would aim to satisfy an existing (but still unsatisfied) or potential consumer demand. It is possible that the importer would have to promote the product in a manner that will contribute to the emergence of this potential consumer demand. These situations of potential consumer demand enter into consideration in the enforcement of Article 34 TFEU, precisely because of the “market building” aim of the internal market project. All that matters is that an economic operator sees an opportunity to introduce a new product, lawfully commercialized in a home State. In this situation, it would be difficult to ask the court to perform a comparative analysis of the additional costs imposed by the regulation on the domestic production in order to decide if the host state’s regulation “prevents” market access or “impedes more” the market access of imported products. An option would be to employ a counterfactual test and assess the costs of the imported products in the absence of the specific host state’s regulation. But it is mathematically certain in this case that the measure will always be qualified as a MEQR.

A possible way out would be to adopt a demand-oriented, as opposed to supply-oriented, test, which would look to a possible protectionist manipulation by the host Member State of the behaviour of the consumers. Host States may act with a protectionist intent or effect either by raising the costs of the imported products or by limiting consumer access to them. The result is the same: imports would be less than in the absence of these measures. But what constitutes protectionist manipulation of the behaviour of the consumers? If one adopts a broad interpretation of this term, there is the risk that policies that reduce overall consumer demand (e.g. salary or social benefit cuts, tax increases etc) in order to increase international competitiveness might fall within the scope of Article 34 TFEU. Undoubtedly, the effect of these measures would be to influence the behaviour of the consumers, reduce consumer demand and consequently imports, compared to the situation that these measures were not adopted. Such a broad interpretation would restrict considerably the policy space for Member States and would extend the potential scope of the Internal market provisions to areas of core economic policy (i.e. income tax system, regulation of labour wages), which have been carefully kept outside the scope of the negative integration provisions of the Treaty.

A restrictive interpretation of the term would focus instead on the existence of a *considerable* (read significant) impact of the measure on consumer behaviour and choice. Only measures which lead to a limited interest or “practically no interest” of the consumer for the imported product would fall, *prima facie*, within the scope of Article 34 TFEU and could lead to a reversal of the evidential burden of proof to the host Member States for justifications. These do not only include restrictions on the use of the

products, but also rules on promotion strategies and other selling arrangements that make it impossible or excessively difficult for imported products to enter the host member State's market. Of course, there should be a causal link between the measure and the limited interest of the consumers: the measure is likely to affect the behaviour of consumers. Otherwise, the scope of the prohibition of Article 34 TFEU would be too broad and could include efficient restrictions of trade. The emphasis of the Court on the "*considerable* influence in the behaviour of consumers" supports this reading[38]. It also contrasts with the exclusion by the CJEU of a quantitative d*e minimis* test, when exploring the impact of the national measure on the supply side.

If a measure imposes some costs on the imported product, this is not sufficient for the application of Article 34 TFEU. The claimant should prove that the regulation imposes costs on the imported product that are not (or have not been) incurred by the domestic product. If it is not possible to perform a comparative analysis of costs, because there is no similar or competing domestic product, the claimant should prove that the measure in question had a considerable impact on the behaviour of the consumers, as a result of which the latter have practically no interest or considerably less interest to purchase it. This analysis is not limited to situations where there is a restriction on the use of the product but applies also for rules on selling arrangements, where there is no competing domestic production.

3. The return of *Dassonville*, demand-side style: the end of the "categorization" approach?

In its subsequent case law the Court seems to have abandoned the categorization approach, thus reversing implicitly the previous trend of the case law towards the adoption the "disparate market access" test in the context of the application of Article 34 TFEU. The main difference with the *Dassonville* era is, however, the emphasis the CJEU puts on the demand side test and the focus on the potential impact of the national measure on consumers' behaviour.

In *Commission v. Poland* and *Commission v. Lithuania*, the CJEU examined the compatibility to Article 34 TFEU of national rules refusing for safety reasons, the registration of right-hand drive cars, unless the steering equipment was removed to the left-hand side of the vehicle, irrespective of whether those vehicles are new or have previously been registered in other Member States[39]. Both Member States argued that their the measures were aiming to ensure road safety as the driver of a right-hand drive car has a field of vision considerably reduced when the traffic is on the right-hand side of the road, Poland also claiming that such measures do not constitute a MEQR

[38] *Commission v. Italian Republic* (C-110/05) [2009] E.C.R. I-519, para 56.

[39] *European Commission v. Republic of Poland* (C-639/11), March 20, 2014, ECLI:EU:C:2014:173. *European Commission v. Republic of Lithuania* (C-61/12) March 20, 2014, ECLI:EU:C:2014:172.

prohibited by Article 34 TFEU. In both cases, national legislation was not interfering with the freedom to market vehicles having their steering equipment on the right, but restricted the ability to register such vehicles. The Commission claimed that the measures treated less favourably goods from other Member States, in as much as the national legislation dissuaded the owners of such vehicles to import them in view of registering them in Poland or Lithuania. Poland was contesting this characterization, arguing that this did not constitute a discriminatory measure, but an indistinctly applicable measure, since vehicles with the steering equipment on the right were also manufactured in Poland.

Advocate General Jääskinen acknowledged that the measures, at least in the case of Poland, were indistinctly applicable. He referred however to the presumption of functional parallelism/equivalence of *Cassis de Dijon* to conclude that article 34 TFEU could apply to indistinctly applicable measures when these prevent goods lawfully manufactured and marketed in another member State to have access to the market of the Host State[40]. That said, he found that the national measures in question placed "at disadvantage" vehicles imported from other Member States after being registered there, "whereas they have to benefit from the free movement of goods", in view of the "additional costs" potential buyers in Lithuania and Poland should incur for transforming their vehicle. Indeed, according to the AG, the latter "lose any interest they had in purchasing such vehicles in another Member State in which they are frequently sold"[41]. The AG then proceeded to a discussion of the competitive situation of the foreign and the domestic products, considering that, for the purposes of the analysis, once imported a product becomes a domestic product and hence imported used cars and those bought locally constitute similar or competing products[42]. He found that because of these extra costs, imported right-hand drive vehicles were disadvantaged as compared to used cars bought locally, "the vast majority of which" were equipped with a left-hand drive. The reasoning of the AG also applied to the Lithuanian situation, even if no cars with steering equipment on the right were manufactured in Lithuania, in view of the assimilation of cars bought locally to the situation of domestic products.

The AG did not feel necessary to characterize the facts of the case as falling within one of the various types of measures envisaged by the jurisprudence of the Court in *Keck* and in *Commission v. Italy* (trailers), that is, product requirements, selling arrangements and restrictions on use. The measure could indeed have been characterized as a restriction on the use of right-hand drive vehicles, but also as a product requirement, in view of the necessity to transform the vehicle and place the steering equipment to the left of the vehicle, a procedure which was costly and could have a significant

[40] AG Jääskinen, *European Commission v. Republic of Poland* (C-639/11), November 7, 2013, para. 73.
[41] AG Jääskinen, *European Commission v. Republic of Poland* (C-639/11), November 7, 2013, para. 74.
[42] AG Jääskinen, *European Commission v. Republic of Poland* (C-639/11), November 7, 2013, para. 75.

impact on the design of the product. The analysis of the competitive situation of the domestic and foreign goods and the emphasis put by the AG on the disparate impact of the regulation to the costs imposed to each of the two categories also indicate that the AG was inspired by the narrow disparate impact on market access approach.

Remarkably, the CJEU did not follow the AG's approach. It simply relied, in one paragraph, on the *Dassonville, Cassis de Dijon* and *Commission v. Italy* cases for the general statement that the contested national measure constituted a MEQR, "in so far as its effect is to hinder access to the (Polish) market for vehicles with steering equipment on the right, which are lawfully constructed and registered in (other) Member States"[43]. The Court then moved to the second step of the analysis, the existence of mandatory requirements justifying this impediment to market access. It dedicated almost twelve paragraphs for the analysis of the measure under the proportionality test, which formed the bulk of the Court's reasoning in this case.

Coming back to first step of the analysis under Article 34 TFEU performed by the CJEU, it should be highlighted that no reference whatsoever was made to the disparate impact of the measure to foreign products, compared to domestic production, and no attention was paid to the behaviour of the consumers in this context. The Court simply mentioned, *en passant*, in examining the proportionality of the national rule in question, that such rule "is likely to reduce the number of such (right-hand drive) vehicles in use in that Member State"[44]. We are back at the (good?) old times of *Dassonville* and *Cassis de Dijon*, when the existence of a likely and abstractly defined obstacle to trade was a sufficient trigger for the application of the functional parallelism/equivalence presumption reversing the burden of proof and leading to the finding of a violation of Article 34 TFEU. The Court clearly opted for the broad interpretation of the market access concept and rejected the "disparate impact on market access" approach. The addition of the "market access" or "hindrance to access" terminology adds therefore nothing specific and it is unclear how different, if any, this is from the old *Dassonville/Cassis de Dijon* "obstacle to trade approach". It seems, after all, that "market access" has been more of a slogan than a transformative "legal concept" in this area of law[45].

In *Commission v. Spain*[46]*,* the CJEU reinforced that trend towards the broad view of market access, yet it also accepted the additional focus on the demand side. The case involved some Spanish regulations for the licensing of

[43] *European Commission v. Republic of Poland* (C-639/11)*,* November 7, 2013, para. 52. The Court took exactly the same approach in *European Commission v. Republic of Lithuania* (C-61/12) March 20, 2014 to the point that it copy pasted the exact same formulation (even making a confusing reference to Poland, instead of Lithuania in paragraph 57).

[44] *European Commission v. Republic of Poland* (C-639/11), March 20, 2014, para.57.

[45] A position advanced by J. Snell, "The Notion of Market Access: A Concept or a Slogan?" (2010) 47 C.M.L.Rev. 437. *Contra* see, I. Lianos, "Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of ''Economic" Integratio", (2010) 21(5) E.B.L.Rev. 705 (explaining the potential transformative effect of the "market access" rule, had the Court confirmed the narrow "disparate market access" perspective).

[46] *Commission v. Spain* (C-428/12) April 3, 2014, ECLI:EU:C:2014:218.

companies providing road transport services, requiring that the age of the first (principal) heavy (more than 3,5 tones) vehicle in the fleet of a newly licensed company should not exceed five months from the date of its first registration. The Commission alleged that such regulation had the effect to limit imports of heavy tracks and violated the principle of mutual recognition, constituting an obstacle to the market access of heavy tracks of more than 3.5 tones in Spain[47]. Spain opposed to this the argument that the scope of the regulation was limited, as only firms established in Spain were subject to this requirement, and that consequently, its effects on intra-EU trade were imperceptible[48]. Furthermore, Spain argued that the Commission had not established that the measure led to a differential treatment of vehicles imported from other Member States[49].

In the absence of an AG Opinion, it is difficult to assess if the measure disfavoured imported vehicles. Spain's argument nevertheless proved to be ineffective, the CJEU adopting the broad "market access" approach, according to which any "obstacle to trade", even if it does not have as its object or effect to treat less favourably foreign goods from domestic products might restrict market access and thus constitute a MEQR under Article 34 TFEU[50]. The Court referred this time only to *Commission v. Italy* (trailers), not *Dassonville* or *Cassis de Dijon*, rejecting the "disparate market access" approach for the broad reading of market access as "obstacle to trade". The last vestiges of *Keck*'s paragraph seventeen have thus been practically wiped away from Article 34 TFEU jurisprudence.

The Court nevertheless proceeded, in the next few paragraphs, to explore the demand side and in particular the effect of the measure in question on consumer behaviour. It found that the prohibition contained in the Spanish regulation "may have a considerable influence on the behaviour of firms wishing to use a vehicle of this nature for complementary private transport, behaviour which in turn can affect access of that product to the market of the Member States in question"[51]. Indeed, consumers, in this case businesses, "will only have a limited interest in buying a truck like this for their complementary private transportation activities"[52]. This finding is not based on any specific analysis of the demand side but on a common sense observation that restricting the use of a vehicle whose registration exceeds five months, as the first heavy vehicle of a fleet of heavy tracks, has the effect of limiting the possibility for firms to make a normal use of the vehicle, whose inherent function is to be used, hence hindering its market access in Spain[53]. The Court rejected Spain's justifications, noting that Spain did not manage to prove that less restrictive to trade alternatives could achieve the alleged objectives of general interest pursued by the Spanish regulation. The Court

[47] *Commission v. Spain* (C-428/12) April 3, 2014, para. 16.
[48] *Commission v. Spain* (C-428/12) April 3, 2014, para. 20.
[49] *Commission v. Spain* (C-428/12) April 3, 2014, para. 25.
[50] *Commission v. Spain* (C-428/12) April 3, 2014, para. 29.
[51] *Commission v. Spain* (C-428/12) April 3, 2014, para. 30
[52] *Commission v. Spain* (C-428/12) April 3, 2014, para. 31.
[53] *Commission v. Spain* (C-428/12) April 3, 2014, para. 32.

also rejected some of the public interest justifications advanced by Spain for not being valid reasons of public interest within the meaning of Article 36 TFEU or mandatory requirements within the meaning of the CJEU's case law, thus exercising a strict control of finality, which is part of the proportionality test.

It follows from the above developments that the CJEU has put into question the two major contributions of *Keck*.

First, the Court disposed of the factual presumption that selling arrangements do not constitute an obstacle to trade, shifting the burden of proof to the claimant to prove the conditions of paragraph seventeen of *Keck,* that is, the measure does not prevent access to the market or impedes access any more than it impedes the access of domestic products. The distinction product requirement for which the presumption of functional parallelism/equivalence operates and selling arrangements for which the opposite presumption applies, taking these rules out of the scope of Article 34 TFEU under certain conditions, does not form any more the cornerstone of free movement law.

Second, the Court also departed from the interpretation *Keck* and some *post-Keck* law gave to the concept of "market access", which as we previously explained has been elevated to being the core concept for the implementation of Article 34 TFEU. In its most recent case law the CJEU adopted a broad definition of the "market access" rule, which looks very close, if not being identical, to the "obstacles to trade" approach that animated the jurisprudence of the Court since *Dassonville/Cassis de Dijon* until its reversal by *Keck*. Yet, the apparent abandonment of the legal categorization approach followed in *Keck* was performed quietly and without any debate as to the appropriate legal standard, the Opinions of all Advocates General in recent free movement cases engaging with *Keck* and its progeny and suggesting different criteria for the interpretation of Article 34 TFEU, none of which was finally taken over by the CJEU. Instead, the Court returned to its previous "obstacle to trade approach", espousing on the way a demand side perspective calling attention to the potential impact of the measure on the behaviour of consumers. This however does not call for any sophisticated evidence as to actual or prospective consumer behaviour, based on some rational choice framework or a behavioural approach[54]. The Court prefers instead a common-sensical approach based on some abstract consideration of the possible costs and disadvantages that consumers may face in their choice of the product subject to the host state's regulation. As we will examine in the following section, this hermeneutic strategy of the Court with regard to Article 34 TFEU is justified by its reluctance to engage in a thorough analysis of the real or likely impact of the national measure, eventually, but not necessarily, calling for some expert economic evidence.

[54] See, for instance, the proposals of A.-L. Sibony, "Can market access be taken seriously?", (2012) 2 Revue Européenne de Droit de la Consommation - European Journal of Consumer Law 323.

Besides the criticisms that one may address to this hermeneutic choice, the almost opaque way this drastic rift in the evolution of the case law on Article 34 TFEU was performed may hint to the weakness of the overall approach of the Court with regard to free movement of goods and the absence of an explicit overall theoretical framework linking the more technical issue of the definition of what constitutes a MEQR to the broader and closely linked question of the interaction of the national and EU level, and of the overall vision of the Internal Market programme of the EU. Despite the existence of extensive academic comments on this central issue and the importance of subjecting important choices over the exercise of regulatory competences at the EU level to public debate and deliberation, the Court found it appropriate to proceed with an implicit reversal of its previous case law, by the organized disappearance of any reference to its *Keck* jurisprudence without any proper explanation as to the reasons that led it to this decision to abandon the principles that for almost twenty years have animated its case law. Even if the explanation provided in *Keck* for the development of a factual presumption for selling arrangements was elliptic and intellectually unsatisfying[55], an explanation was at least provided. The recent case law of the Court on Article 34 TFEU does not offer us a similar "luxury".

4. The turn towards a broad market access approach: "back to the future"?

The swing of the pendulum to the broad view of market access, even with the addition of a demand side test, does not resolve the question that the *Keck* jurisprudence of the CJEU attempted to tackle, that of the adequate interaction between the EU Internal market principles and the regulatory policy space left to Member States. Unless one, of course, takes the view that the purpose pursued by the CJEU was to reduce this regulatory space. It is clear that the most recent case law of the CJEU can potentially lead to an overbroad application of Article 34 TFEU and to the risk of deregulatory bias. More broadly, the hermeneutic choice of the CJEU to open up the first step of the analysis under Article 34 TFEU, may be understood as indicating a shift towards the general reformation of the Internal market project and the law of the free movement of goods in particular.

4.1. The risk of an overbroad interpretation of the scope of Article 34 TFEU

[55] *Keck and Mithouard* (Joined Cases C-267/91 & C-268/91) [1993] E.C.R. I-6097, para. 14 ("(i)n view of the increasing tendency of traders to invoke Article 30 of the Treaty [now Art. 34 TFEU] as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter").

By returning to an approach reminiscent of the "obstacles to trade" jurisprudence of *Dassonville*, the Court subjects itself to the risk of being criticized for the very same reasons that led it in *Keck* to narrow down the scope of Article 34 TFEU. The corrective of the demand side and the focus on consumer interest, which was added to the classic *Dassonville* formula in *Commission v. Italy* (trailers) and taken in the most recent *Commission v. Spain* case is not amenable to providing an operational limiting principle to the extension of the scope of Article 34 TFEU to any national regulation, even indistinctly applicable, that has even a remote link to intra EU trade. The reason is that, contrary to what some authors have called for, the consumer interest approach does not call for the consideration of economic or other evidence as to the possible impact of the measure on consumer demand. The Court conducts an abstract analysis and derives from the possible disincentive the national measure may impose on companies, by increasing their costs, the conclusion that consumers' incentives will be affected. No robust causation test is required in order to link the measure with the alleged impact on the incentives of consumers to buy the product. A simple *contributio*n of the measure to that effect is sufficient, even if the national measure is not *the* principal cause of that effect.

In view of the presumption of functional parallelism/equivalence, the underlying counterfactual compares the situation of the foreign product after the measure imposed by the host state with that of the foreign product following its commercialisation in its home state (country of origin). By essence, any supplementary regulatory obligation to which would be subject the product is deemed to constitute an additional cost, or disadvantage, and thus to affect its potential consumer demand in the host state. Should the Court have made instead the choice of the "disparate impact market access" approach, the counterfactual would have been different: The courts would have to compare the situation of the foreign product after the measure imposed by the host state with that of the competing domestic product following its commercialisation (in the host state). It is only if the measure would have caused a change in the competitive relation between the foreign and the domestic product, that the "disparate market access" criterion would have been satisfied. Hence, consumer interest will be considered affected by the national measure, if the competitive relation between the two products is altered *in the context* of this counterfactual. This limits the scope of the inquiry under Article 34 TFEU.

Certainly, consumer interest may also enter into account, in the absence of competing domestic production, as I have previously explained with regard to measures having a "*considerable* influence in the behaviour of consumers"[56]. The Court's case law does not however provide any indication as to the amount and type of evidence required to prove the "considerable influence in the behaviour of consumers". Would that be based on possible econometric estimations of the evolution of consumer demand, but for the contested

[56] See my discussion below of *Commission v. Italian Republic* (C-110/05) [2009] E.C.R. I-519, para. 56.

measure? Would that also include behavioural economics evidence on consumer behaviour, as some authors have claimed[57]? Or would judges generally base their judgment on some common sense observation, based on introspection and general knowledge, that a measure is likely to affect considerably consumer interest. We are left in the dark.

What is certain, as a result of this case law, is that the first step of the analysis under Article 34 TFEU, the identification of the restrictive to intra-EU trade potential of the measure, catches a wider panel of national measures than the "disparate market access" approach. In the absence of the factual presumption of *Keck* in favour of selling arrangements, the scope of the balancing test will thus be extended. A greater proportion of indistinctly applicable national measures would thus be subject to the second step of the analysis and its proportionality test. As I have explained elsewhere, this test should not involve any effort of quantifying the costs imposed by the restrictions to trade and comparing them to the benefits of the public interest objectives advanced by the Member State[58]. Its objective cannot be to re-evaluate the need for State intervention, performing some form of cost-benefit analysis, that, besides technical difficulties, the courts do not have the information and legitimacy to conduct, but to unveil opportunistic and protectionist behaviour by States. The test might resort to intuitive analysis but it does not require the identification of a specific result of the trade-off, as would a proper cost-benefit analysis test. In most cases, where the Court applied the proportionality test, it divided the analysis in three steps: (1) is the measure suitable to achieve the desired end? (finality test); (2) was it necessary to achieve this end? (necessity test); (3) did the measure impose a burden which was excessive? (suitability) or could the State have adopted alternative means that were less restrictive of trade? (least restrictive alternative test or LRA test). The last two of these conditions may limit considerably the policy space of Member States in achieving objectives of public interest and promoting "efficient trade".

One might disagree with this judicial strategy of attempting to discriminate between "good" and "bad" measures affecting trade in the context of the second step of the analysis for political reasons. Catherine Barnard rightly observed that

> "the type of federalism that the Court of Justice is responsible for shaping must leave space for the sub-units (the states) to regulate and develop at least the matters which form the core of the welfare state, as well as social policy more generally, largely unhindered by the application of [EU] law. Failure to do so may well lead EU citizens blaming the EU for the failure of

[57] See, A.-L. Sibony, "Can market access be taken seriously?", Revue Européenne de Droit de la Consommation - European Journal of Consumer Law 323.

[58] On the operation of this test, see I. Lianos, "Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of ''Economic" Integration", (2010) 21(5) E.B.L.Rev. 705.

the European social model which is so dependent on national welfare policies for its substance"[59].

It is also possible to criticize the approach of the Court for ignoring the inherent limits of its adjudicatory role and the comparative institutional advantage of other institutional actors. First, with regard to the limits of adjudication, the CJEU, as any other court, does not dispose of the tools to adjudicate the inherently polycentric balancing between right of traders to access markets across the Union and the wider public interests pursued by States in regulating their economy in order to assess the legality of the purpose pursued ("legitimate aims") and the legitimacy of the means chosen (necessity, suitability, least restrictive regulatory alternative). In the absence of a common measure, the incommensurability of the values put into the balancing scale would constitute an important obstacle in the performance of the proportionality technique, to which often resorts the CJEU.

One may advance the need for a welfarist analysis, based on some form of social welfare function approach, understood to depend on all the variables that might be considered as affecting welfare, on the basis of some observations and inferences made over the "extended preferences" of the specific political community over bundles of attributes such as trade, health, income, leisure, environmental goods, among others. A decision would thus be reached on the basis of the "marginal social importance" that can be attached to each of the conflicting values, by assessing the importance to the relevant society of the benefit gained by the realisation of the measure in question, as opposed to the importance to society of preventing the limitation of market access[60]. Yet, assigning a weight to the public interest benefit and to the cost of the lost opportunity of trade depends on the perceptions of the relevant society and the pressing nature of the social interest that will be satisfied by the measure. The weighing of values implicit to any effort of balancing also involves by essence a consideration of the serious, moderate or light intensity of the interference with the principle/value/right in question and the concrete importance of the competing principle/value/right[61]. The characterization of the interference as being light, moderate or serious is not independent from the consideration of competing interests. The connection of balancing with discourse unveils the risk that the judicial review of the proportionality of national measures under Article 34 TFEU may tilt the institutional balance from the national legislature to the courts, thus transforming them to final arbiters of public policy choices made by elected or accountable officials.

This criticism to the proportionality test may be overstated. First, "argumentative representation" constitutes an essential ingredient of

[59] C. Barnard, "Restricting Restrictions: Lessons for the EU from the US?", (2009) 68(3) C.L.J. 575.

[60] For a discussion of the use of the proportionality technique and the concept of "marginal social importance", see A. Barak, *Proportionality – Constitutional Rights and their Limitations* (Cambridge: CUP, 2012), pp. 345-362.

[61] R. Alexy, "Balancing, constitutional review, and representation" (2005) 3 International Journal of Constitutional Law 572, p. 576.

deliberative democracy[62]. Elections do not represent the only instrument of democratic legitimacy. Second, the proportionality test, in particular the necessity part of the test, that of the existence of a less restrictive alternative is not as open-ended as it is usually feared by those reticent to recognize to unelected and imperfectly informed as to the overall public policy consequences judges the power to impose regulatory choices. As it has been convincingly argued by some authors, the necessity test does not require the judge to enter into a consideration of the existence of any hypothetical alternative means that restrict less the right or interest in question, but only of those that advance the purpose of the national legislator as well as, or better than, the means used by the limiting law[63]. Any comparison made should not also be between the situation before and that after the national measure was adopted, as this will enhance the deregulatory potential of the proportionality test. It should be between the alternative chosen by the Member State and a proportional alternative that would have advanced the underlying purpose of the national measure, at least to the same extent[64]. The consideration of the various interests affected in the context of the judicial review of the justification of the measures would indeed stretch the technical capacity of the courts and might raise issues relating to the possible limits of adjudication, as opposed to other methods to resolve disputes. It has however been alleged that courts have the institutional capacity and the professional background to understand polycentric facts or problems[65], eventually by calling experts.

Even if the above arguments in favour of an intense judicial scrutiny of national measures that constitute obstacles to trade are perfectly sensible, it remains, however, that developing a narrow definition of MEQR in the context of the first step of the analysis under Article 34 TFEU seems as a less imperfect institutional alternative.

First, the CJEU has rarely explored how the less restrictive to trade regulatory alternatives would have been able to achieve similar or better levels of protection of the general interest put forward for the justification of the restriction of trade. The proportional alternative should not be theoretical or imaginary, but practical in a way that it "stands on its own", the judges performing a comparison between the proportional alternative and that chosen by the national lawmaker[66]. Yet, one may express doubts as to the institutional capacity of a court to perform this comparison between different tools to achieve a specific public policy, in view also of the lack of knowledge as to the existing capabilities of the national administration in charge of promoting this public policy.

Second, and related to the issue of institutional capacity, is the polycentric nature of the problems examined in the second step of the analysis under

[62] R. Alexy, "Balancing, constitutional review, and representation" (2005) 3 International Journal of Constitutional Law 572, p. 579.
[63] A. Barak, *Proportionality – Constitutional Rights and their Limitations* (Cambridge: CUP, 2012), p. 323.
[64] Ibid., 353.
[65] Ibid., 389-390.
[66] Ibid., 356.

Article 34 TFEU, in comparison to the less polycentric nature of the issues to be examined in the context of the first step of the analysis. Indeed, when determining the existence of a disparate impact of the national measure to the imported goods the court needs to examine facts that relate to their competitive situation with regard to domestic products and, in the absence of a competing domestic production, the way this measure may affect consumer demand in the specific Member State, an analysis that may require some degree of economic analysis, but certainly less complex than the balancing test of the second step of the analysis, which is polycentric by essence and requires the weighing of various public interests. The polycentric character of the second step of the test would be less pronounced, had the court adopted the "disparate impact to market access" test, as in this case the objective of the assessment would be naturally to unveil the protectionist intent of the Member State, rendering impossible the slippery towards a re-evaluation of the conflict between the objective of general interest advanced by the Member State and the principle of free intra-EU trade.

Third, the choice of a broad scope of what constitutes obstacles to market access under the first step of the analysis, before narrowing the scope down with the consideration of legitimate restrictions to trade under the second step of the analysis, increases the risk of the deregulatory bias of Article 34 TFEU being reinforced, in particular in view of the presumption of the principle of equivalence. If the Home State has regulated the specific public interest argued by the Host State to justify the restrictions to trade, the degree of protection of the general interest will be presumed to be similar, even if the Host State weighs more heavily the public interest in balance than the Home State, in comparison to the principle of free intra-EU trade.

Certainly, the idea behind the broad "obstacles to trade" approach inaugurated by the CJEU in *Cassis de Dijon* was that such an interpretation of Article 34 TFEU would lead the Member States to consent to an EU-wide harmonization of the principle of general interest put forward, as the only way in this case to override the broad interpretation of the principle of free intra-EU trade or a d*e facto* harmonization, the national legislators adopting as an amendment to the domestic regulation limiting intra-EU trade the less restrictive regulatory option identified by the court, in the context of the examination of the proportionality of the domestic regulation, including the existence of less restrictive to trade alternatives. However, as it was rightly observed by some commentators, the operation of the negative and positive integration approaches is closely interrelated[67]. It makes sense to combine the narrow perspective on MEQR, adopted by the Court in *Keck*, with the limitation of the EU competence to regulate/harmonize diverse national rules that lead to likely obstacles to the exercise of the fundamental freedoms recognized by the Treaty and to appreciable distortions of competition, under Article 114 TFEU, following the *Tobacco Advertising I* judgment of the

[67] E.g., C. Barnard, "What the Keck? Balancing the needs of the single market with state regulatory autonomy in the EU (and the US)", (2012) 2 Revue Européenne de Droit de la Consommation - European Journal of Consumer Law 201, pp. 209-213.

CJEU[68]. Yet, disentangling the *Keck* settlement by re-adopting the broader obstacles to trade approach in the context of Article 34 TFEU, while maintaining the essential of the restrictive interpretation of Article 114 TFEU and of the EU competence in general to regulate public interests affected by the Internal Market leads to deregulatory bias.

One should also note that parallels drawn between the EU positive/negative integration approach and the US approach with regard to the interpretation of the dormant commerce clause are incomplete, as the US Constitution also recognizes the possibility for the federal government to regulate trade under the "General Welfare" clause of Article I, Section 8 of the US Constitution, which according to some authors enables the federal government to intervene, any time collective action at the federal level may promote the General Welfare of the Union, the federal States and the population[69]. Such a possibility does not exist in the EU system, with the result that the only politically acceptable interpretation of the Internal Market provisions of the Treaty is that their aim is to promote "efficient" intra-EU trade and not just intra-EU trade. Adopting the narrower "disparate market access" approach may preserve Article 34 TFEU from being transformed to a deregulatory tool and consequently general welfare to suffer.

Fourth, although there may be arguments to vest courts with the authority to examine the proportionality of the regulatory choices made by the Member States, when these affect intra-EU trade, the Member States being obliged to choose the less restrictive to intra-EU trade regulatory options, one should also acknowledge the limited participation of all affected interests in adjudicatory proceedings as opposed to participation in the rule-making process. By essence, the courts will consider the arguments of the parties involved, including the general interest represented by the Member State, equally as part of their efforts to resolve the dispute, recognizing the wrong committed by one party to the right(s) of the other (correlativity). However, not all domestic interests affected by the litigation will be represented in the adjudication of the dispute. The judge will not have comparable opportunities to be informed on the overall effect of the proportional regulatory option, from those mostly affected by it. It is true that the interests of non-residents have not been considered in the process of law-making that led to the adoption of the domestic measure restricting intra-EU trade. Yet, Regan notes that this representation argument may be undercut by the local/global equivalence principle[70].

---

[68] *Tobacco Advertising I* (C-376/98) [2000] E.C.R. I-8419. Although the CJEU seems to be slowly moving away from such restrictive definition: C. Barnard, "What the Keck? Balancing the needs of the single market with state regulatory autonomy in the EU (and the US)", (2012) 2 Revue Européenne de Droit de la Consommation - European Journal of Consumer Law 201, pp. 211-212.

[69] R. Cooter & N.S. Seigel, "Collective Action Federalism: A General Theory of Article I, Section 8", (2010) 63 Stanford Law Review 115.

[70] D. H. Regan, "Judicial Review of Member-State Regulation within a Federal or Quasi-Federal System : protectionism and Balancing. "da Capo", (2001) 99(8) Michigan Law Review 1853.

4.2. Making sense of the broad "market access" criterion: The reformation of the EU law on the free movement of goods

At a more normative level, the broad market access concept seems to indicate a tectonic shift in the governance of the EU Internal Market and, in particular the law on the free movement of goods. From a practical perspective, adopting a broad market access approach will inevitably lead to the assessment of an important number of national measures under the balancing test of *Cassis de Dijon*, rather than the exclusion of such measures from the scope of Article 34 TFEU under the categorical approach followed in *Keck*[71]*.* A potential impact on trade or on the incentives of market actors to access a foreign market may be sufficient to trigger the application of Article 34 TFEU. In accordance with the presumption of functional parallelism/equivalence, the burden of proof shifts to the Member States, which can argue objectives of public interest that it would not have been possible to attain with less restrictive to trade measures. This is often a difficult burden to overcome, with the result that Member States may be found to violate Article 34 TFEU even if they aim to adopt an "efficient" restriction of trade. Increasing opportunities of trade becomes the objective to maximize, irrespective of the consequences that this may have on other parameters of welfare.

By decoupling the economic – obstacles to intra-EU trade – from the non-economic – mandatory requirements – dimensions this approach enables the CJEU to draw some boundaries between the EU and the national levels. Removing barriers to trade and market access becomes the key objective of the negative market integration provisions of the Treaty, while Member States are provided the opportunity to advance non-economic aims, to the extent that these are not harmonized exhaustively at the EU level and they are proporional. Yet, the relatively narrow interpretation of the conditions of application of Article 114 TFEU and the absence of a "General Welfare" clause enabling the EU institutions to intervene each time collective action at the EU level is efficiency enhancing, in comparison to action at the Member States' level, indicate that instances in which EU institutions have managed to define an EU-wide public interest are relatively limited. The concept of "economic integration" underlying this theoretical construction of Article 34 TFEU seems, at first sight, largely inspired by the narrative of removing trade barriers and achieving regulatory sameness.

The main difficulty with this conceptualization of (economic) integration is that it does not accommodate the need for regulatory pluralism, experimentation and diversity, when this represents the democratic choice of a specific polity to adopt certain standards. Even a cooperative federalist

[71] Of course, this depends on the propensity of the Commission and those affected by national measures to use this possibility to challenge national measures. This may be affected by a number of factors (e.g. access to the courts, resources available, competing priorities, costs and benefits of litigation).

model, presumably that of the EU[72], should accommodate some policy space to the Member States in the implementation of the Internal Market project, Member States enjoying some influence as enforcers of EU Internal Market norms. Not to mention of course the situation of a dual federalist model that would have provided for a mutually exclusive realm of regulatory jurisdiction between Member States and the EU level, based on some legal categorization effort (e.g. economic versus non-economic matters).

One may choose instead to turn to the study of institutions of governance, under the assumption that they provide useful insights as to the interaction between the process of economic integration and legal or regulatory pluralism[73]. In this model, the development of legal rules and informal arrangements in the EU will be viewed as part of a broader effort to mitigate the risks generated by the existence of interaction and interdependence between various regulatory systems. The more diverse the regulatory regimes are, the higher the risks involved. The process of managing these risks leads to the emergence of various governance mechanisms or tools, which present discrete characteristics. There exist different governance mechanisms in order to manage the risks of cooperation engendered by (positive and negative) policy externalities. It follows that the project of economic integration should not necessarily be linked to regulatory sameness and/or eroding trade barriers.

I have advanced elsewhere a different perspective on economic integration, conceived of as a process of building increased levels of "institutional-based" trust (or "system trust") between actors interacting across national boundaries[74]. According to this view, it is only if trust is betrayed by the development of protectionist policies that Article 34 TFEU, as a governance mechanism managing risks generated by the existence of interaction and interdependence between various regulatory systems, should enter into play. Although the choice of the categorization approach in *Keck* presented some disadvantages, in view of the difficulty in devising clear boundaries between the different conceptual categories, it restricted the scope of balancing to measures that were inherently suspicious in view of their protectionist effects.

The move towards a broad market access formula should not, however, be conceived as a return to the *Dassonville* era. Its purpose may be understood more clearly if one links it to the recent trend in trade liberalization/economic

[72] R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: OUP, 2012).

[73] The "trust" view of economic integration was initiated and its contours described in I. Lianos & J. Leblanc, "Trust, Distrust and Economic Integration : Sketching the theory" in I. Lianos & O. Odudu (eds.), *Regulating Trade in Services in the EU and WTO: Trust, Distrust and Economic Integration* (Cambridge: CUP, 2012), pp. 17-56; I. Lianos & D. Gerard, "Shifting narratives in European economic integration: services, pluralism and mutual trust" in I. Lianos & O. Odudu (eds.), *Regulating Trade in Services in the EU and the WTO* (Cambridge: CUP, 2012), 173-261 (in particular pp. 206 seq. drafted by Lianos) .

[74] I. Lianos & J. Leblanc, "Trust, Distrust and Economic Integration : Sketching the theory" in I. Lianos & O. Odudu (eds.), *Regulating Trade in Services in the EU and WTO: Trust, Distrust and Economic Integration* (Cambridge: CUP, 2012), pp. 17-56.

integration projects worldwide to integrate provisions on regulatory cooperation between the various national regulatory systems as a way to generate institutional-based trust between them. Abandoning the "disparate market access" approach for one that adopts a broad market access rule may not necessarily indicate some willingness to limit the regulatory policy space of Member States. Yet, it may signal the preference for another institution, than courts, to solve the difficult trade-offs between promoting trade and other considerations.

Regulatory cooperation and mutual recognition are the governance mechanisms most often employed in the emerging period of "regulatory peace"[75] in order to resolve nascent tensions between trade and non-trade values. For instance, the Services Directive includes provisions on "administrative cooperation", perceived as a tool for barriers to trade reduction[76]. With regard to the external dimension of the Internal Market, the EU/Canada Comprehensive Trade and Economic Agreement includes "horizontal" regulatory cooperation provisions in order to "prevent and eliminate unnecessary barriers to trade and investment", "regulatory compatibility, recognition of equivalence, and convergence", including "(b)uilding trust, deepening mutual understanding of regulatory governance" and "reducing unnecessary differences in regulation", among other similar objectives[77]. It is expected that similar provisions may be included in the Transatlantic Trade and Investment Partnership (TTIP), currently negotiated between the EU and the US. The EU Negotiators Mandate, recently made public, calls for "enhanced cooperation between regulators" and "regulatory compatibility"[78]. Regulatory cooperation has indeed been an essential building block for the transatlantic trade negotiations, since the EU and the US launched the Transatlantic Economic Partnership (TEP) in May 1998, followed by the Initiative to Enhance Transatlantic Economic Integration and Growth with EU-US regulatory cooperation as one of its priorities in 2005, the constitution of the High Level EU-US Regulatory Cooperation Forum, and finally of the Transatlantic Economic Council (TEC) in 2007[79].

Regulatory cooperation is a quite broad concept and may, in general, range from more informal mechanisms of regulatory cooperation, such as basic information sharing to more formal, such as mutual recognition agreements

[75] K. Nicolaidis, "Trusting the poles, Mark 2: towards a regulatory peace theory", in I. Lianos and O. Odudu (eds.), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (Cambridge: CUP, 2012), pp. 263-298.

[76] Chapter VI of Directive 2006/123/EC of the European Parliament and of the Council on services in the Internal Market OJ (2006) L 376/76 on administrative cooperation between Member States, providing for mechanisms for mutual assistance and joint monitoring.

[77] Part 26 of CETA, Articles X.1 to X.9.

[78] Directives for the Negotiation on a Comprehensive Trade and Investment Agreement, Called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America, available at http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf

[79] Section II of the Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union on "Fostering Cooperation and Reducing Regulatory Burdens", available at http://ec.europa.eu/enterprise/policies/international/files/tec_framework_en.pdf

and complete harmonisation of regulatory frameworks[80]. The idea is that once regulatory systems develop some form of "convergence", based, for instance, on a common reliance on scientific expertise and similar regulatory processes, while cooperating in order to promote a common interpretation and understanding of that expert body of knowledge, the reasons for regulatory diversity erode. Whatever one may think of the view that similar inputs of expert knowledge, with some degree of regulatory cooperation and regulatory process convergence, will lead to similar regulatory outputs[81], it is clear that such approach does not attempt to re-judicialise the necessary trade-offs between the value of promoting inter-state trade and other public interest objectives for measures that were, since *Keck*, excluded from judicial scrutiny and thus left to be resolved by national politics. The aim pursued is to kick-start the process of inter-state regulatory cooperation in order to reduce "unnecessary differences" in regulation and achieve "regulatory compatibility"[82]. This raises the question of how effective would be the transnational "epistemic communities[83]" of regulators in generating "institutional-based trust", in comparison to the institutional alternatives of supra-national judiciary[84] or national politics.

Regulatory cooperation does not constitute the only preferred institutional alternative on offer in order to resolve conflicts between trade and other public policy values. What represents another remarkable evolution, at a broader level than the EU Internal market project, is the intermingling of investment and trade in recent trade agreements. One may indeed narrate the progressive move from early trade agreements/regimes focusing on guaranteeing market access to suppliers of goods through negative integration clauses, such as National Treatment, MFN or prohibitions of quantitative restrictions to trade (which I will call "supply-oriented" trade

[80] BIS, DFID, Regulatory Cooperation, Trade and Investment Analytical papers (2011), pp. 7-10, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32467/12-533-regulatory-cooperation.pdf

[81] This approach ignores the complex relation between politics and expertise. Recent studies on the integration of the impact assessment tool in the production of legislative and regulatory norms in various Member States of the EU indicate that despite the common inspiration and knowledge base, the tool has been employed in different ways and that its content greatly varies from jurisdiction to jurisdiction, reflecting in each case the complex interaction of politics and expertise in the specific jurisdiction: I. Lianos & M. Fazekas, "Le patchwork de la pratique des études d'impact en Europe: proposition de taxinomie", (2014) 149 Revue Française d'Administration Publique, 29.

[82] Directives for the Negotiation on a Comprehensive Trade and Investment Agreement, Called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America, available at http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf

[83] This concept was defined by P. M. Haas, "Introduction: epistemic communities and international policy coordination", (1992) 46(1) International Organization 1, p. 3.

[84] Here I include not only the Court of Justice of the EU (and the General Court), but also the national courts when they implement EU law, as they act in this case in their role of "*juge communautaire de droit commun*".

regimes), to trade regimes that are more "consumer-oriented[85]" or responding, more broadly, to citizen's demands for standards protecting public interest values (consumer/citizen-oriented), and, more recently, to trade regimes that aim to protect investors (investors-oriented trade regimes). The categorization approach followed in *Keck* exemplifies, for instance, the move from a "supply-oriented" trade regime, whose starting point was that any barrier to trade may constitute a measure having equivalent effect to a quantitative restriction unless justified, to a "consumer/citizen-oriented" one, which attempts to exclude from the scope of Article 34 TFEU restrictions of trade that do not seem, at first sight, to have a protectionist purpose and which aim to promote "efficient trade".

The development of specific investor-state dispute settlement systems, relying on arbitration, provide alternative fora for traders disgruntled by regulatory measures that affect the value of their assets. For instance, the recent EU/Canada CETA provides for an investor-State dispute settlement mechanism, which enables investors to submit under arbitration a claim that one of the States contracting parties has breached an obligation resulting from the agreement. Although this mechanism does not apply to disputes resulting from a violation of the market access or performance requirements imposed by the CETA (under Section 2 of part 10 CETA), it does apply to disputes relating to Sections 3 (Non-Discriminatory Treatment) and 4 (Investment Protection). The current Mandate for the EU negotiation of the TTIP also includes, among the aims of the agreement, "an effective and state-of-the-art investor-to-state dispute settlement mechanism", which while it won't apply to market access provisions (e.g. including performance requirements), it may enable traders/investors to submit claims to arbitration and eventually receive compensation awards for losses incurred because of the regulatory activity of a Contracting Party. Without entering in a comparative analysis of supra-national courts vis-à-vis international arbitrators in their function as trust-building institutions, suffice is to say that the remedies available to traders may be different in each case. Traders have traditionally relied on the remedial tool of declaratory injunctions in order to defend their market access rights, allegedly curved by restrictive national regulators. The main function of declaratory injunctive relief is to remove the national measure found to infringe the Treaty. The all-or-nothing nature of injunctive relief may have led courts to engage more thoroughly with the arguments raised by Member States defending the allegedly Treaty-violating regulation on grounds of public interest and more cautious in accepting the traders' arguments. Courts may adopt a different, more intrusive to the regulatory policy space of States, approach when the main remedy available consists in compensatory damages, as it is the case with investor-to-state dispute settlements,

[85] S. E. Rolland, "Are Consumer-Oriented Rules the New Frontier of Trade Liberalization?", (2014) 55(2) Harvard International Law Journal 361 (although the author only focuses on "consumer-oriented" aims, in the narrow sense of consumer protection law, and does not examine the broader issue of promoting "efficient trade", that is a trade law that takes into account the preferences of citizens for a certain level of social regulation).

arbitration awards in this context being characteristically an award of damages. The substitutionary nature of this remedy (as in reality it puts a price on the infringement) and its modularity provide a greater degree of flexibility to the decision-maker to make trade-offs between the various values in conflict and to accept more easily some degree of intrusion in the regulatory policy space of contracting parties in order to protect investors' assets. It remains to be seen how the new trade/investors protection-oriented regimes with their specific dispute-settlement mechanisms that are currently put in place will affect the existing institutional mechanisms of the EU Internal market and the regulatory policy space available to Member States.

5. Conclusion

For more than two decades the *Keck* case law and the categorization approach it followed has dominated the EU approach on free movement of goods. At a symbolic level it marked the shift towards a more regulatory-friendly approach in interpreting Article 34 TFEU, providing Member States more ample regulatory policy space to achieve objectives of public interest. Yet, the equilibrium reached at *Keck* soon started to erode and the most recent case law of the CJEU seems to have abandoned it altogether. The study explores the demise of the *Keck* settlement and the reasons that led to it. The hypothesis advanced is that these do not only relate to the internal dimension of the EU Internal Market, the interactions between the EU and the national levels, or the difficulties incurred in implementing the fuzzy legal categories introduced in the *Keck* and post-*Keck* case law. The external dimension of the EU Internal Market, and more broadly the emergence of new trade/investment regimes need also to be taken into account.

In essence, the economic actors involved in trade disputes with Member States of the EU dispose of various institutional arrangements in order to promote their interests: courts implementing Article 34 TFEU, regulatory authorities striving to achieve "regulatory compatibility", specific investor-state dispute settlement systems and so on. These different institutional arrangements complement, in some ways, each other, but may substitute each other as well, should the scope of the trade dispute fall within their respective realms, in particular if some of them offer economic actors more effective institutional fora to achieve their aims. It is unavoidable that these competitive tensions between the various regimes put in place will exercise pressure on the way their rules are interpreted. It is clear that the EU rules on the free movement of goods should not be seen as developing in splendid isolation from the wider context of the law regulating international trade relations and the equilibrium achieved in other institutional fora between the rights of traders, consumers and investors and the broader public interest. The result is that some coherence of purpose, among these various regimes, needs to be achieved, at the level, at least, of background norms.

The preservation of the settlement achieved in *Keck* between those advancing a trade liberalisation agenda and those supporting a wider

regulatory policy space for Member States of the EU cannot be maintained if economic actors dispose of competing fora offering increased possibilities to challenge regulatory interventions. A reformation of the EU free movement of goods law by revisiting the *Keck* Article 34 approach was thus inevitable. The new equilibrium emerging relies on Article 34 TFEU as a trigger for regulatory cooperation with the aim of regulatory convergence, supported by similar or look-alike regulatory processes and a systematic recourse to expertise along similar patterns of inclusion. It remains to be seen how the different institutional arrangements in place, or in the making, will interact with each other in practice and what would be their impact on the regulatory policy space of the EU Member States, or that of the EU Institutions.